

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 07-4354

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED

NOV 12 2008

LEONARD GREEN, Clerk

EUGENE WRINN, JR.,

Plaintiff-Appellant,

v.

DAREN JOHNSON, Ohio State
Highway Patrol (Lima); G.K.
MANLEY, Ohio State Highway Patrol
(Lima); K.J. KOVERMAN, Ohio
State Highway Patrol (Lima),

Defendants-Appellees,

CITY OF LIMA, Lima Municipal
Center, et al.,

Defendants.

**ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF OHIO**

**ORDER OF
CERTIFICATION TO THE
SUPREME COURT OF OHIO**

Before: DAUGHTREY and MOORE, Circuit Judges; GRAHAM,* District Judge.

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant Eugene Wrinn, Jr. ("Wrinn"), appeals the district court's dismissal of Defendants-Appellees, three officers of the Ohio State Highway Patrol (collectively, "OSHP officers"), from his 42 U.S.C. § 1983 lawsuit alleging false arrest, excessive force, and other civil rights violations and seeking monetary relief. Wrinn's principal argument on appeal is that the district court erred in ruling that *Leaman v. Ohio Dep't of Mental Retardation & Development Disabilities*, 825 F.2d 946 (6th Cir. 1987) (en banc), cert.

*The Honorable James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

denied, 487 U.S. 1204 (1988), controls to bar Wrinn's claims in federal court against the OSHP officers under the waiver provision of the Ohio Court of Claims Act ("O.C.C.A."), OHIO REV. CODE ANN. § 2743.02(A)(1), because Wrinn brought an action in the Ohio Court of Claims based on the same conduct. In *Leaman*, we held that § 2743.02(A)(1) barred a plaintiff's federal, as well as state, causes of action against state officials when the plaintiff files suit against the state in the Court of Claims based on the same acts or omissions. Subsequently, the Supreme Court of Ohio decided *Conley v. Shearer*, 595 N.E.2d 862 (Ohio 1992), which suggested that § 2743.02(A)(1) might not apply to federal civil-rights claims. But in *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir. 1995), *cert. denied*, 517 U.S. 1105 (1996), we held that *Conley* did not speak to the question of whether § 2743.02(A)(1) extends to federal claims and therefore *Leaman*'s holding was undisturbed. Still, there remains no decision by the Supreme Court of Ohio interpreting whether § 2743.02(A)(1) applies to federal causes of action.

Neither side in this appeal addressed the question of certification in their briefs. When asked at oral argument about the propriety of certifying the question of § 2743.02(A)(1)'s scope and meaning to the Supreme Court of Ohio, both Wrinn and the OSHP officers (represented by the Ohio Attorney General's office) indicated that they saw no downside to seeking an authoritative interpretation of § 2743.02(A)(1) from the Supreme Court of Ohio. We believe that the interests of judicial federalism and comity strongly favor certifying to the Supreme Court of Ohio the question of whether the state statutory provision, § 2743.02(A)(1), extends to federal causes of action. Accordingly, we **CERTIFY** the question set forth in Section II.B of this order to the Supreme Court of Ohio pursuant to Rule XVIII of the Rules of Practice of the Supreme Court of Ohio. *See generally Planned Parenthood Cincinnati Region v. Strickland*, 531 F.3d 406 (6th Cir. 2008).

I. BACKGROUND

A. Factual History

According to Wrinn's federal complaint, on September 16, 2005, at approximately 2:00 A.M., Wrinn was driving on Interstate-75 in Allen County, Ohio, when he lost control of his car in heavy rain and was struck head-on by a tractor-trailer. J.A. at 15 (Compl. at 6). Wrinn and his two passengers were injured in the crash, and Wrinn lost consciousness from a head injury. *Id.* As the first officer on the scene, Defendant-Appellee Sergeant Daren L. Johnson ("Johnson") of the Ohio State Highway Patrol ("OSHP"), approached Wrinn's car, Wrinn began to regain consciousness and attempted to get out of his car. *Id.* Johnson warned Wrinn to stay in the car, but Wrinn, still disoriented, began walking away. *Id.* Johnson then grabbed Wrinn, and a struggle ensued in which Johnson hit Wrinn in the head with a flashlight and then used his Taser on Wrinn. *Id.* at 16 (Compl. at 7). Other officers arrived on the scene and began assisting Johnson, including Defendant-Appellee Trooper G.K. Manley ("Manley") of the OSHP, other OSHP officers, officers from the Allen County Sheriff's Office, and officers from the Lima Police Department. *Id.*

Wrinn alleges that the various officers used excessive force in forcing him to the ground and handcuffing him, including kneeing Wrinn in the throat and chest, stepping on his head, delivering two more Taser shocks, striking him several times with a flashlight, spraying him with pepper spray, and finally requesting that emergency medical personnel give Wrinn something to "knock him out." J.A. at 16-17 (Compl. at 7-8).

B. Procedural History

Wrinn filed this lawsuit in district court on September 11, 2006, naming three groups of defendants: (1) the three Defendant-Appellee OSHP officers (Johnson, Manley, and their supervisor, Lieutenant K.J. Koverman) in their individual capacities, as well as five John Does from the OSHP; (2) Allen County and various officers from the Allen County Sheriff's Office; (3) the City of Lima and various Lima Police Department officers. J.A. at 13-15 (Compl. at 4-6). Wrinn's federal complaint included six § 1983 claims and two state-law claims and requested monetary damages, litigation expenses, and attorney fees. J.A. at 18-24 (Compl. at 9-15).

Two days later, on September 13, 2006, Wrinn filed a separate action in the Ohio Court of Claims, naming the State of Ohio, Johnson, and Manley as defendants. J.A. at 50-51 (Ct. Claims Compl. at 1-2). This state-court complaint included four claims under Ohio law, arising from the same set of facts alleged in the federal complaint. J.A. at 51-56 (Ct. Claims Compl. at 2-7). The state-court complaint also requested monetary damages, litigation expenses, and attorney fees. J.A. at 56 (Ct. Claims Compl. at 7). On September 15, 2006, the Court of Claims dismissed Johnson and Manley from the case, and substituted the Ohio State Highway Patrol for the State of Ohio as the named defendant. And on December 5, 2006, the court stayed the state suit pending resolution of the federal-court action.

On October 6, 2006, the OSHP (appearing as a interested party) filed a motion to dismiss the OSHP officers (Johnson, Manley, and Koverman) from the federal action under Federal Rule of Civil Procedure 12(b)(6). J.A. at 41-49 (Mot. to Dismiss). The OSHP argued that Wrinn's claims against the OSHP officers in federal court were barred under the waiver provision of the O.C.C.A.,

OHIO REV. CODE ANN. § 2743.02(A)(1), because Wrinn brought suit in the Court of Claims based on the same conduct. J.A. at 44-46 (Mot. to Dismiss at 4-6).

On August 13, 2007, the district court granted the OSHP's motion, dismissing both Wrinn's state and federal claims against the OSHP officers. J.A. at 33 (Order).¹ The district court found that it was bound by *Leaman* and subsequent decisions of this court holding that § 2743.02(A)(1) requires "a complete waiver of all claims, including federal claims, upon the filing of a similar complaint in the Ohio Court of Claims." J.A. at 31 (Mem. Op. at 6). But the district court expressed concern that there was a "clear contradiction of interpretation" between this court's interpretation of § 2743.02(A)(1) and that announced by the Ohio Supreme Court in *Conley v. Shearer*, 595 N.E.2d 862 (Ohio 1992). J.A. at 30 (Mem. Op. at 5). The district court read *Conley* to hold clearly that § 2743.02(A)(1) was "inapplicable to federal causes of action," but concluded that it was bound by this court's post-*Conley* holdings that continue to interpret the § 2743.02(A)(1) as reaching federal claims. J.A. at 31 (Mem. Op. at 6). The district court observed that "[i]t appears incongruous to this Court that such disparate interpretations could persist between the Ohio Supreme Court and the U.S. Court of Appeals for the Sixth Circuit, given the traditional deference of federal courts to the construction of state statutes by the highest state court." *Id.* Because of this perceived conflict, the district court encouraged Wrinn to consider an immediate appeal on this issue. J.A. at 32 (Mem. Op. at 7).

On August 23, 2007, Wrinn moved the court to certify its dismissal order for interlocutory appeal under 28 U.S.C. § 1292(b) or to certify that the dismissal was final and therefore immediately

¹No claims were dismissed as to the remaining defendants—the Allen County Sheriff's officers, Allen County, the Lima Police Department, and the City of Lima. See J.A. at 35 (Mem. Op. and Order at 2).

appealable under Federal Rule of Civil Procedure 54(b). J.A. at 71-72 (Mot.). On September 20, 2007, the district court granted Wrinn's motion to pursue an immediate appeal under Rule 54(b) and stayed further proceedings in the district court pending appeal. J.A. at 34-37 (Mem. Op. and Order). Wrinn timely appealed. On January 22, 2008, Wrinn filed a petition for initial hearing en banc, which was denied on April 11, 2008.

II. DISCUSSION

A. The Propriety of Certification

Rule XVIII of the Rules of Practice of the Supreme Court of Ohio provides that the Supreme Court of Ohio may at its discretion answer a question of Ohio law certified to it by the federal courts. Before certifying a question, we must find that "there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court." R. of Prac. Sup. Ct. Ohio XVIII, § 1. As we explain below, we find that (1) the question of whether § 2743.02(A)(1) extends to federal claims is determinative of the case before us, and (2) that there is no controlling precedent in the decisions of the Supreme Court of Ohio on whether § 2743.02(A)(1) is applicable to federal claims.

The Supreme Court of Ohio has extolled the virtues of federal court certification of unsettled questions of state law as a means of "further[ing] the state's interests and preserv[ing] the state's sovereignty." *Scott v. Bank One Trust Co.*, 577 N.E.2d 1077, 1079-80 (Ohio 1991). As the *Scott* court explained, "[p]oints of state law that seem unclear to federal courts may be quite clear to '[i]nformed local courts,' which 'may find meaning not discernible to the outsider.'" *Id.* at 1080 (quoting *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 30 (1959)). The *Scott* court further urged that "[c]ertification ensures that federal courts will properly apply state law," and

protects against “inadvertent encroachments by federal courts” on state sovereignty. *Id.* at 1081. Similarly, the U.S. Supreme Court has urged federal courts to employ certification procedures when available to clarify unsettled questions of state law. “Through certification of novel or unsettled questions of state law for authoritative answers by a State’s highest court, a federal court may save ‘time, energy, and resources and hel[p] build a cooperative judicial federalism.’” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) (alteration in original) (quoting *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974)). We believe that these interests of comity and judicial federalism counsel strongly in favor of certifying the unsettled question of Ohio law that is determinative of the case before us.

1. The Interpretation of § 2743.02(A)(1) is Determinative of this Case

Wrinn’s interlocutory appeal turns entirely on the proper interpretation of § 2743.02(A)(1).

Section 2743.02(A)(1) provides in relevant part:

Except in the case of a civil action filed by the state, *filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee*, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer’s or employee’s office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

OHIO REV. CODE ANN. § 2743.02(A)(1) (emphasis added). If § 2743.02(A)(1) is interpreted to bar a party’s *federal* causes of action against state officials when the party files a related suit in the Court of Claims, then Wrinn loses. If § 2743.02(A)(1) is interpreted not to encompass federal claims—or at least not federal civil-rights claims—Wrinn would prevail in this appeal.

2. No Controlling Precedent of Supreme Court of Ohio Interpreting § 2743.02(A)(1)

In *Leaman v. Ohio Dep't of Mental Retardation & Development Disabilities*, 825 F.2d 946, 951-53 (6th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1204 (1988), an en banc panel of this court held that § 2743.02(A)(1) barred a plaintiff's federal, as well as state, causes of action against state officials when the plaintiff files suit against the state in the Court of Claims based on the same acts or omissions. The *Leaman* court characterized the waiver provision as a *quid pro quo* in which the state agreed to waive its sovereign immunity and in exchange the plaintiff agreed to waive any claims against state employees. *Id.* at 954. "Although this portion of *Leaman* produced six dissenters, and has been the target of much scholarly criticism, it remains the law of this circuit." *Turker v. Ohio Dep't of Rehab. & Corr.*, 157 F.3d 453, 457 (6th Cir. 1998) (footnote omitted) (citing legal scholarship criticizing *Leaman*).

Five years after *Leaman*, the Ohio Supreme Court decided *Conley v. Shearer*, 595 N.E.2d 862 (Ohio 1992). There, the plaintiff, Conley, brought suit in the Court of Common Pleas asserting state-law claims and a § 1983 claim against an agent of the Ohio Bureau of Criminal Identification and Investigation. *Id.* at 863-64. The trial court dismissed the action, finding that Conley had failed to comply with OHIO REV. CODE ANN. § 2743.02(F), which requires a plaintiff to seek a preliminary determination by the Court of Claims that a state official acted *ultra vires* before the plaintiff may bring suit against the official in the Court of Common Pleas. *See id.* at 864-66. The Ohio Supreme Court upheld dismissal of Conley's state-law claims for failure to comply with the § 2743.02(F) procedure. *Id.* at 866-69. But the *Conley* court reversed the dismissal of Conley's 42 U.S.C. § 1983 claim, which had also been dismissed by the trial court under § 2743.02(F). *Id.* at 869-70. In so holding, the *Conley* court stated broadly that "[OHIO REV. CODE ANN.] § 2743.02 and [OHIO REV.

CODE ANN.] § 9.86 . . . do not apply to claims brought under federal law” and suggested that state immunity defenses in general could not interfere with a plaintiff’s right to bring a § 1983 action. *Id.* at 869. Because *Conley* did not directly deal with subsection (A) of § 2743.02, the question of whether § 2743.02(A)(1) is applicable to federal claims remains unsettled under Ohio law. On the one hand, there is the broad language in *Conley* suggesting that § 2743.02 as a whole is inapplicable to federal causes of action.² On the other hand, *Conley* may stand for the narrower proposition that a plaintiff need not first comply with the § 2743.02(F) procedure before bringing federal claims against a state official in the Court of Common Pleas.

In *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir. 1995), *cert. denied*, 517 U.S. 1105 (1996), this court adopted the latter reading of *Conley* and therefore concluded that *Leaman* was not altered by the *Conley* decision. The *Thomson* court read *Conley* to mean only “that a claim under § 1983 may be brought directly in the Court of Common Pleas, and thus is not subject to Ohio Rev. Code § 2743.02(F).” *Thomson*, 65 F.3d at 1319. The court further explained that “[i]n essence, a plaintiff may sue the state under § 1983 in the Court of Common Pleas instead of the Court of Claims, but if he chooses the latter, he is bound by his decision.” *Id.* Because it read *Conley* as dealing only with subsection (F) of § 2743.02 and not with the other subsections of § 2743.02, the *Thomson* court concluded that *Conley* did not affect *Leaman*’s holding that § 2743.02(A)(1) bars a plaintiff’s federal action if he brings a related action in the Court of Claims. The court stated that:

Conley does not alter the calculus where a party chooses to waive certain claims in order to gain access to the state’s coffers via the Court of Claims; then, a plaintiff’s

²This is the reading pressed by Wrinn and the reading the district court believed was demanded by the language of *Conley*.

decision to file in that forum mandates dismissal under § 2743.02(A)(1), not § 2743.02(F).

Thomson, 65 F.3d at 1319.³

According to this court's interpretation of § 2743.02(A)(1) in *Leaman* and *Thomson*, therefore, a plaintiff waives all claims he may have against state officers, including federal claims, when he brings suit in the Court of Claims based on the same acts or omissions. If we were to decide the case before us without certifying this question to the Ohio Supreme Court, therefore, we would be bound by *Leaman* and *Thomson* to hold that all of Wrinn's claims against the OSHP officers are barred by § 2743.02(A)(1). See, e.g., *Plinton v. County of Summit*, 540 F.3d 459, 463 (6th Cir. 2008).

However, the Supreme Court of Ohio has never directly ruled on the question of whether § 2743.02(A)(1) is applicable to federal claims. Our decisions in *Leaman* and *Thomson* remain speculation, or *Erie* guesses, about the meaning of § 2743.02(A)(1). As the U.S. Supreme Court has explained, "[s]peculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." *Arizonans for Official English*, 520 U.S. at 79 (internal quotation marks omitted). Accordingly, we believe that the interests of judicial federalism and comity strongly favor certification of the question presented in this case.

³In dissent, Chief Judge Merritt argued that *Conley* stood for the broader proposition that § 2743.02 in its entirety does not apply to federal claims. See *Thomson*, 65 F.3d at 1322 (Merritt, J., dissenting) ("The Supreme Court of Ohio has now expressly agreed that federal claims are not waived as a matter of Ohio law, and we should simply admit our mistake in *Leaman* and not persist in it, as though we know more about Ohio law than the Ohio Supreme Court.").

B. The Certified Question of State Law

For the reasons explained above, we certify the following question of Ohio law to the Supreme Court of Ohio pursuant to Rule XVIII of the Rules of Practice of the Supreme Court of Ohio:

Does OHIO REV. CODE ANN. § 2743.02(A)(1) require waiver of a party's federal causes of action against state officers or employees when that party files suit in the Ohio Court of Claims based on the same act or omission?

C. The Information Required by Rule XVII

Because this court is certifying a question to the Supreme Court of Ohio, we provide the following information in accord with Rule XVIII, § 2(A)-(E).

1. **Name of the case:** Please refer to the caption on page 1 of this order.
2. **Statement of facts:** Please refer to § I of this order for a full recitation of the pertinent facts and the circumstances from which the question of law arises. Please refer to § II.B of this order for a statement of the question of law to be answered.
3. **Name of each of the parties:**
 - a. Plaintiff-Appellant: Eugene Wrinn, Jr.
 - b. Defendants-Appellees: Daren Johnson, Ohio State Highway Patrol (Lima); G.K. Manley, Ohio State Highway Patrol (Lima); K.J. Koverman, Ohio State Highway Patrol (Lima).
 - c. Other Defendants: John Does 1-5 (Ohio State Highway Patrol, Lima); City of Lima (Lima Municipal Center); Lima Police Department Officers Curt Hile, John Dunham, Jr., Officer Douglass, Bev Leary, C. Stevenson, A. Cortes, J.G. Garlock, and John Does 6-10; Allen County; Allen County Sheriff's Office Officers Robert Tomasi, T. Myers, Daniel W. Beck, and John Does 11-15; John Does 16-20.
 - d. Interested Party: Ohio State Highway Patrol.

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- 5. Designation of Moving Party:** Although neither side has sought certification, we designate Plaintiff-Appellant Eugene Wrinn, Jr., as the moving party.

E. Instructions to the Clerk

In accordance with Rule XVIII, § 3 of the Rules of Practice of the Supreme Court of Ohio, Mr. Leonard Green, Clerk of the United States Court of Appeals for the Sixth Circuit, is hereby instructed to serve copies of this certification order upon counsel for the parties and to file this certification order under the seal of this court with the Supreme Court of Ohio, along with appropriate proof of service.

III. CONCLUSION

For the reasons discussed above, we **CERTIFY** a question of state law to the Supreme Court of Ohio.

A handwritten signature in cursive script, reading "Karen Nelson Moore", written in black ink over a horizontal line.

Karen Nelson Moore
United States Court of Appeals for the Sixth Circuit